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No. PD-0343-17

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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JAMEL McLELLAND FOWLER, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Hunt County

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STATE'S BRIEF ON THE MERITS

* * * * *

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NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgments are the State of Texas and Appellant, Jamel McLelland Fowler.

*The cases were tried before the Honorable Andrew Bench, 196th Judicial District Court, Hunt County, Texas.

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IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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v.

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* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Authentication of evidence should be a straightforward exercise in common sense. When an item appears to be what the proponent claims it is, the trial court should let the jury decide. When a party offers a video because it shows what previously admitted evidence predicted it would show, the possibility of a coincidence is not enough to exclude it.

STATEMENT OF THE CASE

Appellant was convicted of stealing an all-terrain vehicle (ATV). One of the main pieces of evidence supporting guilt was a store video depicting appellant making a purchase documented by a receipt found by the later-abandoned ATV. The court of appeals reversed because the State presented no direct evidence of the

video's relevance. Particularly, it held that there was no evidence that the date and time stamp on the video, which matched that on the receipt, was accurately set and properly functioning.

STATEMENT REGARDING ORAL ARGUMENT

The State did not request oral argument.

ISSUE PRESENTED

May the proponent of a video sufficiently prove its authenticity without the testimony of someone who either witnessed what the video depicts or is familiar with the functioning of the recording device?

STATEMENT OF FACTS

Appellant was tried in a single trial for one count of theft and two counts of burglary of a building. This appeal arises out of the theft conviction.[1]

The property appellant was convicted of stealing is an ATV called a Kawasaki Mule belonging to Paul Blassingame.[2] It was discovered missing on November 18 or 19, 2014,[3] and found a few weeks later at the scene of a burglary at Lattimore

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[1] The State dismissed one of the burglary cases before it rested. 11 RR 5-6. Appellant was convicted of the remaining burglary charge but the trial court granted appellant's motion for new trial and entered a judgment of acquittal. 13 RR 24-25. This office's petition for discretionary review in that case, PD-0307-17, was granted and the cause remanded for reconsideration in a published *per curiam* opinion on June 28, 2017.

[2] 8 RR 130, 138-39, 215.

[3] 8 RR 144-45, 203, 225.

Materials (Lattimore), a shut-down concrete manufacturing facility.[4]

The area manager assigned to inspect the Lattimore property reported a string of criminal mischief and thefts in November and December of 2014.[5] Police found ATV tracks on the property after responding to a call there on December 1st.[6] Police believed it was used to pull wiring out of the ground to be sold for scrap.[7]

Tracks were found again on December 5th.[8] Royse City Police Officers Torrez and Meek followed the tracks into the nearby treeline and found the ATV.[9] They confirmed it was stolen.[10] Numerous items were found nearby, including cable matching the type stolen from another site and a receipt from Family Dollar.[11] The receipt showed six items, including two listed as "utility knife" and two rolls of duct tape, purchased with cash.[12] The packaging for "cutters" (also called "plastic cutters"

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4 9 RR 112-13; 10 RR 94.

5 10 RR 93, 97-98, 107-14.

6 9 RR 149.

7 9 RR 149; 10 RR 24.

8 10 RR 115, 117.

9 10 RR 35, 42-43, 46, 117-18; State's Exs. 111-12 (photos).

10 10 RR 46.

11 10 RR 36, 38, 47, 67 (three feet away); State's Exs. 115 (photos), 119 (receipt).

12 10 RR 42, 64; State's Ex. 119.

and "box cutters" in the record) was found nearby.[13] The packaging appeared to match the item on the receipt.[14]

Torrez and Meek went to Family Dollar to see if there was any video that could be helpful.[15] They asked the manager to pull security video matching the date and time on the receipt.[16] The footage provided showed what Torrez believed to be a man purchasing box cutters.[17] Because they were unsure whether they could obtain an original copy of the recording from the store, Meek recorded the security playback with a police video camera.[18] Torrez tried multiple times to find a manager who could get them an original video of the security footage, to no avail.[19]

The video shot by Meek shows appellant purchasing six items with cash, two of which appear to be rolls of duct tape.[20] As is common, the security monitor shows four camera feeds on a single screen. Although the date and time stamp is not in view at the time of the purchase, it is clear earlier in the video; it reads, in military time,

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[13] 10 RR 42, 46 (15 to 20 feet away), 69; State's Ex. 114 (photo).

[14] 10 RR 69.

[15] 10 RR 37, 65.

[16] 10 RR 48, 60-61.

[17] 10 RR 63. Although the video shows the purchase of what could be at least one utility knife/box cutter, the package found at the scene of the recovered ATV is not readily apparent.

[18] 10 RR 48, 83; State's Ex. 120.

[19] 10 RR 89-90.

[20] State's Ex. 120.

16:54:18 as Meeks pans upward and zooms in on the register. At that point, the officers decided to fast-forward to the time on the receipt, which is 17:01:54. At faster than normal speed, the video shows five other customers being served and a short span in which the counter was vacant.

Appellant made multiple objections to the video.[21] After viewing it, the judge saw only one problem: "I think that there's one question I need to ask to make sure before I know how to proceed. . . . I don't know if the officer has testified how he determined what time and date he was going to make the video for."[22] Defense counsel added this to his list of objections.[23] The trial court noted that there is a date and time stamp on the video but was unclear how it got there: "I don't know what date and time it purports to depict. And it's not relevant unless I know that."[24] Appellant agreed and ultimately focused his objection on the State's failure to establish, through the Family Dollar employee who pulled the video, the date and time the original video was made:

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[21] 10 RR 52-56. First, the State "can't go around the rule . . . of bringing the original video" by bringing a copy. 10 RR 52. Second, it was an incomplete copy because it focused on one quadrant of the security footage. 10 RR 53-55. Third, the State needs someone from Family Dollar to testify that they could not produce the video for police. 10 RR 56.

[22] 10 RR 57.

[23] 10 RR 58 ("I'm waiting to get (sic) as we go through this process, because they've not established that the video that he's videoing is of what date or time.").

[24] 10 RR 59-60.

> [Officer Torres] can't testify to that because he can say [']I asked for this.['] But that doesn't mean that this video that's being played for him is that. And that requires that somebody has to come from Family Dollar or somebody that says that's the video that we pulled. That's my point. I'm objecting to that.[25]

Back in front of the jury, Torrez testified that 1) he requested the Family Dollar manager to replay the video from the date and time on the receipt, 2) the video had a date and time stamp, and 3) the date and time on the video matched the date and time on the receipt.[26] The trial court admitted the video over a renewed predicate objection and general objections under Rules 402, 403, and 404.[27]

SUMMARY OF THE ARGUMENT

The trial court was well within its discretion to admit the video at issue. The liberal admissibility standard for authentication was satisfied by the match between its contents and distinctive characteristics on one hand, and the surrounding circumstances leading to its discovery on the other. Any gaps in proof were a matter for the jury, not the trial court in its gate-keeping role.

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[25] 10 RR 57-60.

[26] 10 RR 61.

[27] 10 RR 62.

ARGUMENT

I. The law favors admissibility.

Authentication is not "a particularly high hurdle."[28]

"To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."[29] "Authentication and identification represent a special aspect of relevancy."[30] Proffered evidence has no relevance, and is therefore inadmissible, if it is not what its proponent claims it is.[31] When relevance depends on whether a fact exists, the trial court must be satisfied that there is sufficient proof supporting that fact.[32] Thus the previous version of Rule 901 referred to authentication as a "condition precedent" to admissibility.[33]

The trial court's task is a narrow one. "The preliminary question for the trial court to decide is simply whether the proponent of the evidence has supplied facts

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[28] *United States v. Ortiz*, 966 F.2d 707, 716 (1st Cir. 1992) (discussing FED. R. EVID. 901(a)).

[29] TEX. EVID. R. 901(a).

[30] FED. R. EVID. 901, Notes of Advisory Committee on Rules (comment to Rule 901(a))(citation omitted). This Court often looks to interpretations of the Federal Rules of Evidence for guidance in construing its own Rules. *Angleton v. State*, 971 S.W.2d 65, 68 (Tex. Crim. App. 1998).

[31] *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012); TEX. EVID. R. 402 ("Irrelevant evidence is not admissible.").

[32] *Druery v. State*, 225 S.W.3d 491, 502 (Tex. Crim. App. 2007); TEX. R. EVID. 104(a), (b).

[33] *Tienda*, 358 S.W.3d at 638.

that are sufficient to support a reasonable jury determination that the evidence he has proffered is authentic."[34] Importantly, "the trial court itself need not be persuaded that the proffered evidence is authentic."[35] Whether a conditional fact has been proven is a question for the jury in a jury trial.[36]

Because admission "requires merely 'sufficient' evidence 'to support' authentication[,]"[37] it "has been aptly described as a 'liberal standard of admissibility.'"[38] "Appellate review of a trial court's ruling on such a preliminary question of admissibility is deferential; the standard is abuse of discretion."[39] "An abuse of discretion occurs 'only when the trial judge's decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree.'"[40] Thus, if the trial judge "reasonably believes that a reasonable juror could find that the evidence has been authenticated or identified," no abuse of discretion is presented.[41]

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[34] *Id*.

[35] *Id*.

[36] *Id*.; *Druery*, 225 S.W.3d at 502.

[37] *Butler v. State*, 459 S.W.3d 595, 605 (Tex. Crim. App. 2015).

[38] *Id*. at 600 (quoting Cathy Cochran, TEXAS RULES OF EVIDENCE HANDBOOK 922 (7th ed. 2007-08)).

[39] *Tienda*, 358 S.W.3d at 638.

[40] *Zuliani v. State*, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003) (quoting *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992)).

[41] *Druery*, 225 S.W.3d at 502.

Modes of proof should be flexible.

The way in which evidence of a certain type must be authenticated is not set in stone. Rule 901 makes clear that the nine methods provided "are examples only—not a complete list—of evidence that satisfies the requirement[.]"[42] Instead, authentication "can be accomplished in myriad ways, depending upon the unique facts and circumstances of each case."[43] And, "[a]s with evidence in general, authenticating evidence may be direct or circumstantial."[44]

Although this flexibility was built into the Rules of Criminal Evidence,[45] it has not been consistently recognized. Some of this Court's early post-Rules cases on the authentication of sound recordings missed the point of liberalizing the standards of admissibility. Before the Rules, this Court held in *Edwards v. State* that the admissibility of sound recordings depended on a seven-factor predicate.[46] In *Stapleton v. State*, this Court determined that the Rules "superceded" that common-

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[42] TEX. R. EVID. 901(b).

[43] *Butler*, 459 S.W.3d at 601.

[44] *Id.* at 602.

[45] Before the Rules were rewritten to use simpler language, Rule 901(b) was titled "Illustrations" and began, "By way of illustration only, and not by way of limitation, ..."

[46] *Edwards v. State*, 551 S.W.2d 731, 733 (Tex. Crim. App. 1977). The factors were: (1) a showing that the recording device was capable of taking testimony, (2) a showing that the operator of the device was competent, (3) establishment of the authenticity and correctness of the recording, (4) a showing that changes, additions, or deletions have not been made, (5) a showing of the manner of the preservation of the recording, (6) identification of the speakers, and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement. *Id*.

law test, but only because they had "incorporated substantially the seven-pronged test of *Edwards*."[47] And in *Kephart v. State*, it held that Rule 901 is "consistent with" its pre-Rules cases regarding authentication of video tapes, which "required that either the *Edwards* test be satisfied or a sponsoring witness have knowledge of the scene depicted."[48]

The Court changed course four years later. In *Angleton v. State*, the trial court admitted into evidence an enhanced copy of a tape found in the briefcase of Angleton's brother.[49] The court of appeals found error because the sponsoring witness did not have personal knowledge of the original's creation, could not swear that the tape was an accurate recording of the conversation it purported to represent, could not testify as to the accuracy of the equipment that made the recording, and offered no information about the proffered tape other than that it was an enhanced copy of the audio tape found in the briefcase.[50] This analysis was consistent with *Kephart*.[51] It was not, this Court held, consistent with "the plain language of Rule

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47 *Stapleton v. State*, 868 S.W.2d 781, 786 (Tex. Crim. App. 1993).

48 *Kephart v. State*, 875 S.W.2d 319, 322 (Tex. Crim. App. 1994).

49 *Angleton*, 971 S.W.2d at 66.

50 *Id*. at 67.

51 *Id*. at 68-69.

901."[52]

"Rule 901," the Court said, "is straightforward, containing clear language and understandable illustrations."[53] "[A]ttempting to cling to the *Edwards* test after the enactment of Rule 901 will result in unwarranted confusion for practitioners, trial courts, and appellate courts."[54] Rather than applying *Edwards* by rote, the Court considered which examples provided by Rule 901 applied to the particular authentication question at hand.[55] In that case, it relied on Rule 901(b)(1) (testimony of witness with knowledge), (b)(4) (distinctive characteristics and the like), and (b)(5) (voice identification).[56] Despite the sponsoring witness's ignorance on the factors mentioned above, he had personal knowledge the copy accurately depicted the original because he had heard both the original and the enhanced copy, and he recognized both voices on the tape.[57] More importantly, the contents of the tape and circumstances under which it was obtained supported its authenticity. On the tape, Angleton could be heard giving his alarm code to his brother, a man he later

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[52] *Id*. at 68.

[53] *Id*. at 69.

[54] *Id*.

[55] *Id*. at 67 ("Thus, *in this case* the authentication question has three parts: . . . .") (emphasis in original).

[56] *Id*.

[57] *Id*. at 68.

implicated in his wife's murder in the home.[58] Furthermore, the police took the original tape from Angleton's brother; it was neither created by law enforcement nor voluntarily released to them.[59] The Court concluded that the trial court did not abuse its discretion in ruling the tape was properly authenticated.[60]

". . . taken together with all the circumstances."

Like *Angleton*, this case presents an authentication question involving a copy of a recording. "[A]s with the authentication of any kind of proffered evidence, the best or most appropriate method for authenticating electronic evidence will often depend upon the nature of the evidence and the circumstances of the particular case."[61] It is the last aspect of authenticity discussed in *Angleton*—applying Rule 901's "distinctive characteristics and the like" example[62]—that has been most commonly used in recent cases.

For example, in *Tienda*, this Court sanctioned the admission of various statements from two MySpace pages over the objection that anyone could have created those pages and attributed them to Tienda. This Court conceded that it was "within the realm of possibility that the appellant was the victim of some elaborate

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58 *Id*.

59 *Id*.

60 *Id*. at 69.

61 *Tienda*, 358 S.W.3d at 639.

62 TEX. R. EVID. 901(b)(4).

and ongoing conspiracy" such that the evidence was fake.[63] However, the numerous photographs on the pages showing Tienda and his distinctive appearance, mentions of personal and gang-related facts, references to the victim's death and funeral, and an e-mail address matching Tienda's name justified permitting the jury to weigh that likelihood for itself.[64]

In *Butler*, the trial court admitted a series of text messages sent over a span of eight minutes.[65] The State's sole basis for admission was the testimony of the recipient of Butler's texts—the alleged victim—who said that the screen shots from her Blackberry contained Butler's phone number and that he called during the eight-minute span from that number "talking mess."[66] The court of appeals reversed; without the testimony of the cellular phone company, it held, the victim's testimony would have to have been further developed to include whether Butler identified himself, how she knew it was him calling, or how she recognized his voice.[67] This Court disagreed. While the simple fact of phone number ownership, like the return address on a letter, may not be enough on its own to prove authorship, it could be

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[63] *Tienda*, 358 S.W.3d at 645.

[64] *Id*. at 645-46. Interestingly, the circumstantial evidence used to authenticate the MySpace pages in *Tienda* included a photograph relevant in part due to a date stamp four months prior to the murder, the accuracy of which was apparently not made an issue. *Id*. at 643 & n.43.

[65] *Butler*, 459 S.W.3d at 599.

[66] *Id*. at 600.

[67] *Id*.

enough when combined with other circumstances.[68] Despite the fact that the victim's personal knowledge of Butler's number had to be presumed from past experience, her answers to predicate questions were "not without ambiguity," and much had to be implied from her answers, the jury could have rationally determined Butler sent the texts because: (1) he had called her from that number on past occasions; (2) the content and context of the text messages convinced her that the messages were from him; and, (3) he actually called her from that same phone number during the course of that very text message exchange.[69]

Butler is a good example of the "liberal standard" at work. As the Court reiterated, "The State could have endeavored to make all of these circumstantial indicia of authenticity more explicit and less ambiguous than it did[,]" but that did not deprive the trial court of the discretion to admit the messages.[70] Nor was it controlling whether the victim's credibility had been "seriously impeached" by a previous statement implicating someone other than Butler:

> Even when a trial court judge *personally* harbors some doubt as to the general credibility of a sponsoring witness, a decision to admit particular evidence sponsored by that witness may not necessarily be outside the zone of reasonable disagreement. So long as the ultimate fact-finder could rationally choose to believe the sponsoring witness, and the witness's testimony would establish that the item proffered is what its

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[68] *Id*. at 601-04.

[69] *Id*. at 603.

[70] *Id*. at 604.

> proponent claims, the trial court will not abuse its discretion to admit it.[71]

Because it would not have been irrational for the jury to credit the victim's testimony, "[t]he trial court's decision to admit the content of the text messages and leave the ultimate question of authenticity to the jury was well within the zone of reasonable disagreement."[72]

II. This Court's commonsense approach dictates affirming the trial court.

If anything, the issue in this case is more narrow and more easily dealt with than in *Angleton*, *Tienda*, and *Butler*. Although the court of appeals broadly stated that, "there was nothing presented to show that the store's surveillance video was what the State purported it to be (an accurate recording or rendition of events in that particular store on a particular day at a particular time)[,]"[73] it conceded that the video was adequately shown to be an accurate copy of a video that shows someone who looks like appellant making the relevant transaction.[74] As such, there is no real question whether video technology in general or the camera in this case is capable of

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[71] *Id*. at 605 (emphasis in original) (internal quotations omitted).

[72] *Id*. at 606.

[73] *Fowler v. State*, 517 S.W.3d 167, 174 (Tex. App.–Texarkana 2017).

[74] *Id.* at 173 ("Torrez adequately demonstrated that the recording he made of the store's surveillance monitor was a duplicate copy of the relevant part of the original surveillance recording."), 176-77 ("Most importantly [to the sufficiency analysis], the Family Dollar video depicted a person making the transaction that was linked to the ATV whom the jury could have easily determined was [appellant].").

accurately recording images.[75] Nor is there a lack of "evidence in the record which establishes the origin of the original recording which was subsequently copied and presented as evidence[,]" as the court claimed in a footnote.[76] Instead, the only authenticity question in this case is whether the relevance of the admitted video was sufficiently established through the date and time stamp on the original video.

The trial court's ruling should have been upheld by applying Rule 901(b)(4) to the basic facts of the case. That example suggests that "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances" can provide sufficient evident to support the trial court's finding. Viewing the issue through the eyes of the police illustrates why the trial court was correct to let the jury decide for themselves whether the video was relevant.

The police suspected an individual who made a specific purchase at a specific time at a specific store. The video at issue was deemed relevant by police only because it showed that purchase at that time at that store.[77] If the video from the time

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[75] It is questionable whether, at this point, the proponent of a video or other recording made through established means should have to offer testimony about the process in the absence of any indication the device was malfunctioning. *See United States v. Harris*, 55 M.J. 433, 438 (C.A.A.F. 2001) ("Any doubt as to the general reliability of the video cassette recording technology has gone the way of the BETA tape.").

[76] *Fowler*, 517 S.W.3d at 173 n.12.

[77] Again, the police focused on the purchase of "cutters" that may or may not be associated with the package found near the ATV, but the number of items and type of items apparent on the video, (continued...)

on the receipt had not shown the purchase they expected, they would have had to keep searching the video for that purchase and then reconcile the date/time stamp discrepancy. But it did match.[78] Satisfied, the police moved on what they found. That was rational, just as it was rational for the jury to use it to convict appellant.[79] And if rational jurors could do so, the trial court should let them.

"It is, of course, within the realm of possibility that the appellant was the victim of some elaborate and ongoing conspiracy" or horrible coincidence.[80] Maybe the date/time stamp on the camera is off. Maybe the register and camera show the same wrong date and time. And maybe appellant happened to make the same purchase at the same store as the real thief but at a different date or time. As in *Tienda*, that was an argument appellant was free to make to the jury—not a ground for exclusion.[81]

In fairness, there are times when providing direct testimony to prove the accuracy of the date/time stamp will be required. If all police knew was that a crime

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[77](...continued)
plus the use of cash, matched the receipt.

[78] Even the court of appeals concedes that it "generally corresponds." *Id*. at 174.

[79] *Id*. at 176-77 (including video in legally sufficient evidence).

[80] *Tienda*, 358 S.W.3d at 645.

[81] In closing, appellant challenged the value of the video on a few bases but not on the accuracy of the date/time stamp. Rather, he accepted it ("we know that's on 12/01 during the daytime apparently, looks like[,]") and asked what happened between that day and when the receipt was found. 10 RR 112-13.

was committed at a certain time and thought a nearby camera might have captured the perpetrator, there might be no other characteristics or surrounding circumstances to sufficiently prove the accuracy of the stamp. In that case, "evidence that the surveillance system was working properly on the date in question, [and] that its on-screen clock was correctly set and functioning properly"[82] would have to be provided by the operator or manager of the camera. But that is not the case here. The trial court had sufficient proof that the video is what the State claimed it was because its contents—including the date/time stamp—match the evidence that led police to obtain it in the first place.

III. Conclusion

Like the images and references in the MySpace pages in *Tienda* and the similarity of content between the calls and texts in *Butler*, the link between the distinctive characteristics of the video and the circumstances surrounding its recovery justify the trial court's ruling admitting it. As this Court has repeatedly held, it is the jury that should determine the ultimate issue of whether the evidence is what the proponent says it is. Judging from the court of appeals's sufficiency analysis, even it could not fault a rational jury for finding the video is what the State said it was. Only its rigid reliance on pre-Rules modes of proof prevented it from applying that

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[82] *Fowler*, 517 S.W.3d at 174.

commonsense analysis to uphold the trial court's ruling. This Court should reaffirm its abandonment of frameworks and predicates that conflict with the straightforward, clear language of Rule 901.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 5,035 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13th day of November, 2017, a true and correct copy of the State's Brief on the Merits has been eFiled or e-mailed to the following:

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